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State v. Cunningham Appellant's Brief Dckt. 39566

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 39566
)	
v.)	
)	
KEITH DUANE CUNNINGHAM,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA

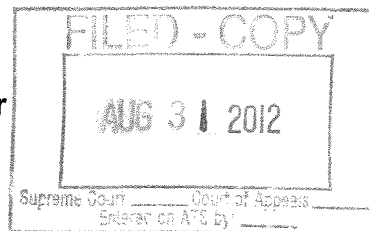
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STATEMENT OF THE CASE

Nature of the Case

Keith Duane Cunningham appeals from the district court's order denying his motion to dismiss the withheld judgment. Mindful of the Idaho Supreme Court's holdings in *State v. Hardwick*, 150 Idaho 580 (2009), Mr. Cunningham nevertheless asserts that the district court abused its discretion when it denied his Motion To Dismiss Withheld Judgment.

Statement of the Facts and Course of Proceedings

The prosecuting attorney charged Mr. Cunningham with the crime of statutory rape. (R., pp.36-37.) The parties entered into a plea agreement, wherein the State agreed to recommend a seven-year sentence, with probation, and Mr. Cunningham was free to argue for a withheld judgment and no further jail time. (R., p.33.) The district court followed Mr. Cunningham's recommendation and ordered a withheld judgment and probation for seven years. (R., pp.53-59.)

On September 15, 2011, Mr. Cunningham filed a Motion To Dismiss Withheld Judgment. (R., pp.60-62.) He asserted that he had not received any probation violations, complied with probation, and it would be in the best interest of society if the court dismissed the case. (R., pp.60-62.) After a hearing, on October 19, 2011, the district court denied Mr. Cunningham's motion in an exercise of discretion. (R., pp.69-70.)

Within fourteen days of the denial, Mr. Cunningham filed a Motion To Reconsider. (R., pp.71-74.) The district court denied the motion at the hearing. (Tr., p.19, Ls.4-25.) No order reflecting that the motion to reconsider was denied has been filed with the court. (See *generally* Record.) Mr. Cunningham filed a Notice of

Appeal within 42 days of the district court's oral pronouncement that it was denying Mr. Cunningham's motion. (R., p.80.)

ISSUE

Mindful of the Idaho Supreme Court's holdings in *State v. Hardwick*, 150 Idaho 580 (2009), did the district court abuse its discretion when it denied Mr. Cunningham's Motion To Dismiss Withheld Judgment?

ARGUMENT

Mindful Of The Idaho Supreme Court's Holdings In *State V. Hardwick*, 150 Idaho 580 (2009), The District Court Abused Its Discretion When It Denied Mr. Cunningham's Motion To Dismiss Withheld Judgment

Pursuant to I.C. § 19-2604(1), the district court may “set aside the plea of guilty or conviction of the defendant, and finally dismiss the case and discharge the defendant” if two circumstances are met. I.C. § 19-2604(1). First, the district court must not have found nor the defendant admitted, during probation violation proceedings, that a condition of probation had been violated. *Id.* Second, the district court is convinced that dismissing the case is “compatible with the public interest.” *Id.* At the time of both the offense and the imposition of the withheld judgment in this case, Idaho law allowed the withdrawal and dismissal of a conviction. I.C. § 19-2604(1). Unfortunately, four years after complying with the terms of probation and abiding by the contracts he made with the State, the Idaho Legislature changed the law. 2006 Idaho Session Laws, ch.157, § 1, p.473. As amended in 2006, and as the statute reads today it provides, “A judgment of conviction for a violation of any offense requiring sex offender registration as set forth in section 18-8304, Idaho Code, shall not be subject to dismissal or reduction under this section.” I.C. § 19-2604(3). The Idaho Supreme Court has twice held that the statute applies to withheld judgments given prior to the enactment of the law and that the application does not violate *ex post facto*. *State v. Forbes*, 152 Idaho 849 (2012); *State v. Hardwick*, 150 Idaho 580 (2009). Mr. Cunningham is mindful of these holdings; however, he still contends that the law should not apply to him because that was not the agreement he had with the State of Idaho when he entered into lawful probation contracts for several years with this State.

Mindful of this Idaho Supreme Court's holding in *State v. Hardwick*, that a withheld judgment may not be dismissed if the crime is a qualifying registerable offense, Mr. Cunningham nevertheless asserts that the district court abused its discretion when it denied his motion to dismiss the withheld judgment and the motion to reconsider the decision to dismiss the withheld judgment. There were no probation violations filed in his case. (*See Record Generally*; Tr.10/19/2011, p.8, L.2.) Moreover, he contends that his compliance with probation over the years demonstrated that it was in the best interest of society to dismiss the case.

Mr. Cunningham made a mistake when he was young. After knowing all of the facts and the risks that Mr. Cunningham posed to society, the district court authorized a withheld judgment. (R., pp.53-59.) Now, the district court judge has indicated that the reason she gave the withheld was that it gave her more authority over Mr. Cunningham. (Tr.10/19/2011, p.5, L.24-p.6, L.4.) She also indicated that she often does this type of judgment when the State recommends probation. (Tr., p.5, Ls.22-25.) As explained in *State v. Branson*, 128 Idaho 790 (1996), the district court could issue a withheld judgment to maintain control over a case, it does not change the ultimate "purpose of a withheld judgment . . . to allow a defendant an opportunity to rehabilitate and to spare the defendant, particularly a first-time offender, the burden of a criminal record." *State v. Murillo*, 135 Idaho 811, 814 (Ct. App. 2001). Thus, the district court may not eliminate the possibility of dismissal because the reason it provided the withheld in the first instance was to grant it more control. *Cf. id.*

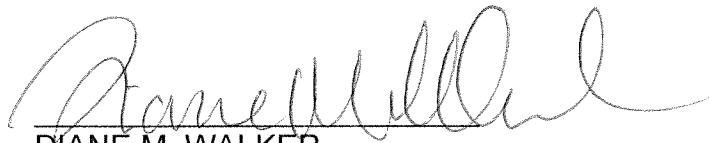
Mr. Cunningham demonstrated by his cooperation with the probation department for seven years that he has been rehabilitated. (R., pp.60-61.) The State presented no evidence that it had filed probation revocation proceedings against Mr. Cunningham.

(See *generally* Record.) Mr. Cunningham asserts it would be in the best interest of justice to dismiss his withheld judgment. (R., pp.60-61.)

CONCLUSION

Mr. Cunningham respectfully requests that this Court reverse the district court's order denying his motion to dismiss the withheld judgment.

DATED this 31st day of August, 2012.

A handwritten signature in cursive script, appearing to read "Diane M. Walker", written in dark ink.

DIANE M. WALKER

Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

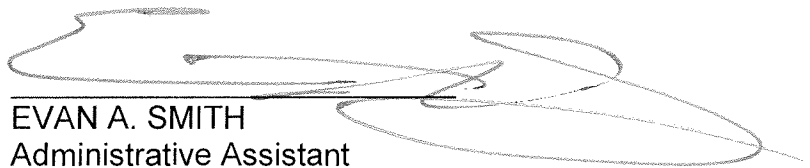
I HEREBY CERTIFY that on this 31st day of August, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

KEITH DUANE CUNNINGHAM
2460 SUNSET AVENUE
BOISE ID 83702

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DISTRICT COURT JUDGE
E-MAILED BRIEF

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